

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
CHARITY KRISTIN ROSS,	)	
	)	CASE NO. BK02-41206
Debtor(s).	)	
	)	A03-4041
CHARITY KRISTIN ROSS,	)	
	)	
Plaintiff,	)	CH. 7
	)	
vs.	)	
	)	
UNIVERSITY OF NEBRASKA-LINCOLN,	)	
	)	
Defendant.	)	

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on June 25, 2003, on defendant's motion to dismiss (Fil. #3) and resistance by the debtor (Fil. #7). Lea Thomas appeared for the debtor, and John Wiltse appeared for the University of Nebraska. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

The motion is granted.

The debtor filed this adversary proceeding to obtain a hardship discharge of a student loan debt owed to the defendant. The defendant moved for dismissal, arguing that no subject-matter jurisdiction exists here because the university has the benefit of immunity under the Eleventh Amendment.<sup>1</sup> Specifically,

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<sup>1</sup>The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

It is well established that "[w]hile the amendment by its terms does not bar suits against a State by its own citizens,  
(continued...)

the defendant relies on May v. United States (In re May), No. 00-3102, 2001 WL 238077 (8th Cir. Mar. 12, 2001) (per curiam), which held that the Missouri Department of Revenue was entitled to Eleventh Amendment immunity in an adversary proceeding because it had not subjected itself to the court's jurisdiction by filing a claim in the bankruptcy case. The United States Bankruptcy Court for the Western District of Missouri followed May and Rose v. United States Dep't of Educ. (In re Rose), 187 F.3d 926 (8th Cir. 1999), in ruling that the Missouri entity holding the debtor's student loans was protected by the Eleventh Amendment, as it had not filed a proof of claim in the underlying bankruptcy case. Haag v. Sallie Mae (In re Haag), 274 B.R. 833 (Bankr. W.D. Mo. 2002).

The debtor resists dismissal, arguing that the State of Nebraska gave up its sovereign immunity in ratifying the U.S. Constitution, that bankruptcy proceedings are *in rem* and not subject to a sovereign immunity defense, and that the Eleventh Amendment does not apply in this case because the loan at issue is federally guaranteed.

The Eleventh Amendment exists for two reasons: protecting the state's finances and preserving the state's sovereign dignity. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 39 (1994). Of these, "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." Id. at 48.

The Eighth Circuit Court of Appeals has made it clear that Eleventh Amendment immunity does not automatically protect a state's educational institutions. "Each state university claiming eleventh amendment immunity 'must be considered on the basis of its own particular circumstances.'" Sherman v. Curators of the Univ. of Missouri, 16 F.3d 860, 863 (8th Cir. 1994) (quoting Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985)). In Greenwood, the Eighth Circuit set out a framework for determining whether the Eleventh Amendment applies to a subdivision of a state: "Courts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury." 778 F.2d at 453 (quoting Laje v. R.E. Thomason Gen. Hosp., 665

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<sup>1</sup>(...continued)

[the United States Supreme] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

F.2d 724, 727 (5th Cir. 1982)).

The Sherman case involved a breach of contract and promissory estoppel action brought by a terminated employee. The Eighth Circuit remanded the matter for factual findings on the Greenwood factors, particularly on whether payment of damages, if any, to the plaintiff "would necessarily implicate the state fisc." Sherman, 16 F.3d at 864 (emphasis in original). The appellate court also suggested that the district court consider, to the extent relevant, the nine factors set forth in Kovats v. Rutgers, The State Univ., 822 F.2d 1303, 1307 (3d Cir. 1987), which the Eighth Circuit noted was the only appellate court decision holding that a state university does not share its state's Eleventh Amendment immunity.<sup>2</sup> Those nine factors include: (1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility from the agency's operations. Sherman, 16 F.3d at 865 n.6 (citing Kovats, 822 F.2d at 1307).

The Nebraska federal district court has previously considered the Greenwood and Sherman factors in determining that

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<sup>2</sup>The Third Circuit Court of Appeals based its decision on the following:

Our examination of the circumstances surrounding Rutgers leads us to conclude that a majority of the relevant criteria weigh against considering Rutgers an arm of the state entitled to Eleventh Amendment immunity. Rutgers was originally a private institution. Though it is now, at least in part, a state created entity which serves a state purpose with a large degree of state financing, it remains under state law an independent entity able to direct its own actions and responsible on its own for judgments resulting from those actions.

Kovats, 822 F.2d at 1312.

the University of Nebraska is an arm of the state and protected by the Eleventh Amendment. See Redmond v. Univ. of Nebr., No. 4:95CV3223, 1995 WL 928211 \*3 (D. Neb. Dec. 5, 1995) ("[I]t is clear that the Board of Regents is financially controlled by the state."); Osterloh v. Agric. Research & Dev. Ctr., No. 8:95CV0001, 1996 WL 885548 (D. Neb. Apr. 22, 1996) (ARDC is indisputably a unit of the University of Nebraska; the university cannot spend money without legislative appropriation, so it is a state agency for Eleventh Amendment purposes. The court also considered the Kovats elements and ruled that even if the plaintiff's recovery did not implicate the state fisc, the remaining factors mandated a conclusion that the university is an arm of the state.); and Lundberg v. Univ. of Nebr., No. 4:95CV3448, 1996 WL 883606 (D. Neb. Nov. 25, 1996) (upon reconsidering an initial ruling that the record was insufficient to determine if the university had Eleventh Amendment immunity in light of Sherman, the court followed Osterloh and Redmond in ruling that the university was protected by the Eleventh Amendment but noted that such a holding was not res judicata if a plaintiff could show that the status of the university had changed.)

The Eighth Circuit Court of Appeals in May affirmed the B.A.P. decision that the State of Missouri Department of Revenue has Eleventh Amendment immunity from suit in bankruptcy court. That holding is applicable to the State of Nebraska, acting through the University of Nebraska. Therefore, because this court is bound by the district court decisions concerning the status of the University as an arm of the state and deserving of Eleventh Amendment immunity from suit in federal district court, and by the May decision of the Circuit concerning the applicability of the Eleventh Amendment immunity of a state agency in bankruptcy court, the motion to dismiss must be, and is, granted.

Separate order will be filed.

DATED: July 14, 2003

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*John Wiltse

Lea Thomas

U.S. Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

Hearing was held in Lincoln, Nebraska, on June 25, 2003, on defendant's motion to dismiss (Fil. #3) and resistance by the debtor (Fil. #7). Lea Thomas appeared for the debtor, and John Wiltse appeared for the University of Nebraska.

IT IS ORDERED: The defendant's motion to dismiss this case (Fil. #3) is granted. See Memorandum filed this date.

DATED: July 14, 2003

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*John Wiltse  
Lea Thomas  
U.S. Trustee

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